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No. 16-1454

IN THE

Supreme Court of the United States

STATE OF OHIO, ET AL.

Petitioners,

v.

AMERICAN EXPRESS COMPANY & AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF 25 PROFESSORS OF ANTITRUST LAW AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI*[1]

Amici are 25 antitrust scholars who write to share with the Court their disinterested perspective as those who study the doctrine. Their respective credentials are compiled in the attached addendum, but it suffices to note that they include many leaders in the field, including the author of the treatise most often relied upon in this Court's antitrust decisions. *See, e.g.*, *Kimble v. Marvel Entm't*, 135 S. Ct. 2401, 2415 (2015) (Alito, J. dissenting); *FTC v. Actavis*, 133 S. Ct. 2223, 2227 (2013); *Comcast v. Behrend*, 133 S. Ct. 1426, 1437 (2013) (Ginsburg & Breyer, JJ. dissenting); *Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351, 1363 (2013); *Pac. Bell Tel. Co. v. Linkline Commc'ns Inc.*, 555 U.S. 438, 453 (2009); *Leegin Creative Prods. Inc. v. PSKS*, 551 U.S. 877, 894 (2007) (all citing P. Areeda & H. Hovenkamp, *Antitrust Law* ("Areeda & Hovenkamp")).

Amici strongly believe that the decision below is sufficiently important and sufficiently out of step with contemporary antitrust doctrine that this Court should grant certiorari to reconsider immediately the Second Circuit's approach. Left alone, the decision below will warp proper antitrust analysis going forward, subjecting parties to difficult and expensive discovery into questions that lack an intelligible answer under basic principles of antitrust law and economics, and leading the lower courts into confusing

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[1] No party's counsel authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All counsel of record received timely notice of *amici's* intent to file this brief, and all parties consented to the filing.

and unproductive inquiries that will only sow greater confusion into a difficult area of law.

Simply put, this case represents a critical opportunity for the Court to clarify the appropriate application of the Rule of Reason in cases where the defendant claims to inhabit a "two-sided market," and the Court should take it. It will find that special rules like the Second Circuit's are unnecessary: So-called two-sided markets may be of growing importance in the modern economy, but they are nothing new, and ordinary antitrust principles still clearly dictate the right approach. *Amici* thus strongly believe that, to ensure that antitrust doctrine does not evolve in fundamentally unsound directions, the Second Circuit's errant approach should be weeded out before it takes root. The Court should grant certiorari, and reverse.

SUMMARY OF ARGUMENT

After an extensive trial, the district court in this case correctly held that the Non-Discrimination Provisions (NDPs) imposed on merchants by American Express (Amex) violate the Sherman Act under the Rule of Reason because they eliminate horizontal price competition between the four credit card networks for the sale of services to merchants—"dramatically" increasing the prices merchants pay to accept credit cards. The Second Circuit nonetheless reversed. It held that the plaintiffs failed to make a *prima facie* case under the Rule of Reason because they had not shown that the injury to merchants in their market for credit-card services outweighed any potential procompetitive effects in the market where card companies compete to obtain cardholders. The court

justified this holding by concluding that both merchants and card members consume Amex's credit-card services in a "two-sided market," and that the plaintiffs thus had to show a "net" anticompetitive effect embracing both sides of the platform to make out a *prima facie* case.

That holding raises two fundamental questions regarding the proper application of the Rule of Reason, and answers both incorrectly. First, it raises the question of what constitutes a *prima facie* showing of an adverse effect on competition, sufficient to shift the burden to the defendant to come forward with evidence of a procompetitive justification for its conduct. *See, e.g.*, *Actavis*, 133 S. Ct. at 2236; *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 788, 792 (1999) (Breyer, J., concurring in part); *infra* pp.13-15 (explaining recognized burden-shifting framework). The plaintiffs demonstrated that Amex's NDPs obstructed price competition by preventing merchants from either communicating true cost information to consumers or granting them price discounts or other benefits for using lower-cost payment cards. But the Second Circuit believed that, because Amex *might* use the revenue from its elevated merchant prices to grant reward points (*i.e.*, discounts) to its cardholders, and that potential benefit to competition for cardholders *might* offset the injury to price competition in the sale of services to merchants, the plaintiffs had not yet shown "an adverse effect on competition in the relevant market" for purposes of the Rule of Reason's burden-shifting framework.

This holding misses the very point of the burden-shifting, Rule-of-Reason approach. This Court has long held that the protection of price competition is the

paramount goal of the antitrust laws, and that eliminating that competition with respect to any component of price formation is an adverse effect on competition. Even if Amex operates a two-sided platform—a point whose significance is quite misunderstood, as discussed below, *see infra* pp.16-21—the obstruction of price competition in any part of the prices paid is an adverse effect on competition, which must be justified by procompetitive effects to avoid condemnation under the Rule of Reason. Accordingly, the burden was *on Amex* to come forward with evidence of procompetitive effects stemming from its suppression of price competition; the plaintiffs had already done their part.

The second, related question is whether a plaintiff must show a "net" harm to competition, embracing both sides of a two-sided platform, to prevail. The Second Circuit said "yes," but the answer should be no. This Court has considered cases involving so-called "two-sided markets" and never imposed such a requirement.[2] *See, e.g.*, *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 598, 610 (1953). Contrary to the Second Circuit's view, the very

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[2] A firm that operates a two-sided platform sells different services to two different sets of purchasers. A firm operating such a platform is often referred to as inhabiting a "two-sided market." But "the economic concept of two-sided platforms or markets is not the same as the legal concept of the *relevant market* in antitrust law, a distinction that economists and lawyers alike recognize." *U.S. Airways, Inc. v. Sabre Holdings Corp.*, 2017 WL 1064709, *8 (S.D.N.Y. 2017) (citing Evans and Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 Competition Policy Int'l 151, 153 & n.5 (2007)).

different services that payment card companies offer to merchants and cardholders respectively are not substitute products, and so do not belong in the same relevant market from the standpoint of antitrust law and economics. Treating products that cannot be substituted for each other as part of one relevant market is not even intelligible; it prevents the relevant-market inquiry from accurately answering the questions for which it is asked. And, relatedly, netting harms among different consumers buying different products in different relevant markets essentially inverts a core premise of antitrust law—namely, that so long as price signals are not distorted by anticompetitive behavior, the efficient allocation of resources is best achieved by the free market itself, not judicial balancing.

The Second Circuit's approach to these issues conflicts with rulings of this Court and fundamental antitrust principles. Given the importance of this case and the increasing importance in the modern economy of firms operating two-sided platforms, the Second Circuit opinion presents a significant threat to effective antitrust enforcement and to the sound development of antitrust doctrine. In fact, because the special "two-sided market" rules and netting analysis called for by the Second Circuit are so hard to fit within existing law, the only result of leaving the decision in place will be to damage the doctrine and the development of proper antitrust analysis going forward. The interim effect will be to put parties and courts through expensive and unproductive inquiries, while doing potentially irremediable harm to a set of legal principles that are already difficult for some courts to accurately apply. In this particular instance,

amici believe that it is essential that the Court act swiftly to clarify the doctrine and avoid deepening confusion on these important issues.

BACKGROUND

I. The Conduct At Issue

Merchants who purchase Amex credit card services account for approximately 95% of all retail sales in America. Each of those merchants enters into an agreement with Amex that contains Amex's NDPs. The NDPs prohibit merchants from using price discounts or any other inducement to influence a consumer to use a payment card that charges the merchant a lower fee than Amex. Pet. App. 19a-20a, 94a-96a, 100a-101a. The NDPs also prohibit any Amex-accepting merchant from conveying its own preference for alternative credit cards or debit cards—which cost much less to accept. Merchants cannot even truthfully advise consumers that Amex charges them more than other networks, and that the merchant increases its retail prices to cover the added expense. Pet. App. 91a-96a. These provisions are, essentially, a vastly more restrictive form of the anti-surcharging laws this Court recently considered in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), creating commensurately more dramatic effects on effective price competition.

II. The District Court's Findings

After a long trial involving voluminous evidence and expert testimony, the district court found that Amex's NDPs (1) obstruct price competition between Amex, Visa, MasterCard and Discover for the sale of credit-card services to merchants (Pet. App. 23a-24a, 71a, 191a-200a), and (2) increase "dramatically" the

prices merchants pay to all four networks. Pet. App. 71a; *see also id.* 68a, 195a-196a, 203a, 240a-241a. The district court also found that merchants increase their retail prices to cover the elevated credit-card fees, meaning that *all* consumers pay higher retail prices because of Amex's anticompetitive behavior. Pet. App. 68a, 191a-193a, 210a-212a, 221a n.46.

More specifically, the district court found that, if merchants could steer consumers to lower-cost credit cards by offering them lower prices or discounts, then consumers would switch to the lower-cost cards and the higher-priced cards would lose market share (Pet. App. 192a, 195a-197a, 217a-219a, 227a-228a)—as should happen in a competitive market. The NDPs prevent that price competition, however, because they eliminate any competitive incentive a card network would have to cut prices to merchants, who have no power to reward lower-cost networks with more charge volume at the register. In the district court's words "the NDPs short-circuit the ordinary price-setting mechanism in the network services market by removing the competitive 'reward' for networks offering merchants a lower price for acceptance services." Pet. App. 71a. And the result is higher prices charged not only by Amex, but by all the networks. Pet. App. 192a.

III. The Decision Below

The Second Circuit did not overturn any of the district court's factfinding. It nonetheless reversed the ruling that Amex had violated the Sherman Act under the Rule of Reason. It reasoned that the proven restraint on price competition in the market for services to merchants did not constitute a *prima facie* showing of an adverse effect on competition because

supracompetitive merchant prices might be used to increase the rewards that Amex gives to cardholders. Pet. App. 39a-40a, 43a-44a, 49a-54a. Holding that the injury to "merchant pricing is only one half of the pertinent equation," it ruled that a *prima facie* case of an adverse effect on competition would require *the plaintiffs* to show that higher merchant fees were not offset by higher cardholder rewards and that the "net" two-sided price had gone up. Pet. App. 44a, 49a-50a, 51a-52a ("Plaintiffs' initial burden was to show that the NDPs made all Amex consumers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall.").

Notably, the Court of Appeals did not find that Amex had presented evidence of a procompetitive justification for the injury its NDPs cause to merchant price competition. Nor did it find that Amex had in fact increased rewards to cardholders by as much as it increased prices to the merchants.[3] Instead, the Second Circuit held that under the Rule of Reason, Amex had no obligation to present evidence of

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[3] Amex admitted "that not all of [its] gains from increased merchant fees are passed along to cardholders in the form of rewards." Pet. App. 51a. In fact, as the district court found, part of the increase "drops to [Amex's] bottom line," and Amex "spends less than half of its discount fees it collects from merchants on cardholder rewards." Pet. App. 209a-210a. But that is not the key point: Even if Amex passed on to cardholders all the excess revenue it collects from merchants, that would not constitute an efficient net price. Merchants pass the added Amex fees on to all their customers, including those who do not use Amex cards. Those customers, in effect, pay higher retail prices to cover the cost of rewards that go only to Amex cardholders. There is nothing efficient about person A paying for rewards that go only to person B.

procompetitive effects because the plaintiffs had failed to meet their initial burden of showing that competition had been injured, on balance, for both sets of Amex's customers—what it described as "the relevant market 'as a whole.'" Pet. App. 51a-52a.

This followed from the court's conclusion that the relevant market for evaluating Amex's conduct had to include the services sold by Amex to *both* merchants and cardholders and that the district court thus erred by finding a relevant market for (and anticompetitive effect in) the sale of network services to merchants alone. Pet. App. 32a-33a. Having defined the market that way, the court required the plaintiffs to prove that the injury to price competition on the merchant side of the platform was not outweighed by any hypothetical benefit to competition on the cardholder side. Pet. App. 43a-44a, 49a-54a. Absent this "net" injury, there would be no violation. *Id.*

REASONS FOR GRANTING THE WRIT

The Second Circuit made two critical errors in applying the Rule of Reason to the "two-sided market" it purported to identify below. We begin by explaining those errors, and then turn to the pernicious effects they will have on the development of antitrust doctrine, and the reasons this Court should grant immediate plenary review.

I. Proof Of Adverse Effects On Horizontal Price Competition Must Suffice To Shift The Burden To Defendants To Prove Any Alleged Procompetitive Justifications.

The Second Circuit did not dispute that Amex's NDPs prevent merchants from communicating truthful price information or offering lower prices to

consumers in an effort to reward card networks that offer merchants lower prices for their services. Pet. App. 19a-20a, 23a-24a. Nor did the Second Circuit dispute that Amex's NDPs thus obstruct price competition among all the card networks for the sale of services to merchants. It nonetheless required more—a showing of net harm across both sides of the supposed two-sided market—to make out a *prima facie* case and shift the burden of proving a procompetitive justification for the NDPs' restraint of competition to Amex. That ruling conflicts with fundamental antitrust principles and is very likely to significantly undermine future antitrust enforcement and doctrine.

Most critically, it fails to account for the fundamental place that horizontal price competition occupies in antitrust analysis. This Court has long held that "price is the 'central nervous system' of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-26 &n.59 (1940), and that the protection of price competition is "an object of special solicitude under the antitrust laws." *United States v. Gen. Motors Corp.*, 384 U.S. 127, 148 (1966). As a result, this Court has found conduct that "tampers with price structures," *Socony*, 310 U.S. at 221, or "chill[s] the vigor of price competition," *United States v. Container Corp. of Am.*, 393 U.S. 333, 337-38 (1969), to be uniquely harmful to competition and contrary to the Sherman Act. Indeed, this Court has held that a restraint that "disrupts the proper functioning of the price-setting mechanism" violates the Rule of Reason "even absent proof that it resulted in higher prices." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 461-62 (1986). This Court has also held that "[a] restraint

that has the effect of reducing the importance of consumer preference in setting price" is inconsistent "with th[e] fundamental goal of antitrust law," *NCAA*, 468 U.S. at 106 & n.30, and that conduct that "impedes the ordinary give and take of the marketplace and substantially deprives the customer of the ability to utilize and compare prices" adversely affects competition. *See Nat'l Soc. of Prof. Eng'rs v. United States*, 435 U.S. 679, 693-94 (1978); *Ind. Fed'n*, 476 U.S. at 459 ("[A]n agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' ... cannot be sustained under the rule of reason[.]"). Notably, this kind of effect is *conceded* here. It makes no sense for a court to require more before shifting the burden and asking a defendant to provide proof that its restraint is necessary to provide procompetitive benefits to the market.

Here, the Amex NDPs prevent merchants from offering customers lower prices or discounts to use a competing, lower-cost payment card. If merchants could do so, many of them would use those steering techniques to incentivize customers to use lower-cost cards and higher-cost cards, such as Amex, would lose market share. Pet App. 192a-195a, 197a, 214a-219a, 227a-228a. If the high-cost cards wanted to stop that loss of sales, they would have to compete on price or quality so as to encourage merchants not to steer customers to other cards. Amex's NDPs tamper with market forces and prevent such competitive conduct from determining the market price. They also deprive retail consumers of both price information and the ability to exercise their preference for a discount or other incentive from a merchant instead of rewards from Amex.

Absent the Second Circuit's special rule for cases involving two-sided platforms, this evidence would have easily sufficed to establish an adverse effect on competition warranting a burden-shift to the defendants. Indeed, the district court so held. Pet. App. 227a-228a. But there is no reason for such a special rule; nothing about the fundamental antitrust analysis should change even if Amex operates a two-sided platform. Contrary to the Second Circuit's holding, the merchant price is not "only one half of the pertinent equation." Pet. App. 44a. That is because the obstruction of price competition on just one "side" of the market would still constitute an adverse effect on competition—it would still cause all the distortions and deleterious effects on free market mechanisms described above.

A close analogy is found in this Court's reasoning in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). There, the defendants' conduct prevented competition over credit terms, but they argued that their anticompetitive arrangement could still be excused because competition would flow to other aspects of their arrangements with counterparties—including the actual purchase price. This Court nonetheless held that, because credit terms were "an inseparable *part* of price," the agreement among the defendants had to be treated as a restraint on horizontal price competition, and so was unlawful under the Sherman Act. *Id.* at 648 (emphasis added). The same point applies here. Even if Amex operates a two-sided platform and collects a net two-sided price—and even if competition might shift from the merchant terms to the cardmember terms—the merchant price is nonetheless an "inseparable" component of price,

and the elimination of competition with respect to that component has an adverse effect on competition, just as in *Catalano*.

Simply put, proof that Amex's conduct severely disrupted price competition in the sale of network services to merchants clearly should have sufficed to establish a *prima facie* case of an adverse effect on competition under the Rule of Reason. In fact, that is among the most fundamental kinds of anticompetitive effects a plaintiff can show, and the law cannot ask plaintiffs to prove more—at least at the outset of the analysis.

To be sure, the defendant can attempt to prove that the adverse effect on competition is outweighed by offsetting procompetitive effects, but the Second Circuit compounded its error here by placing this burden on the plaintiffs. It did so on the theory that plaintiffs must show "an actual adverse effect on competition *as a whole* in the relevant market,'" and that, "[h]ere, the market *as a whole* includes both cardholders and merchants." Pet. App. 51a-52a, 53a (emphasis original). Apart from the Second Circuit's confusing holding that a special approach to relevant markets is necessary for two-sided platforms, *see infra* pp.16-19, this constitutes a substantial departure from the now-accepted approach to Rule of Reason cases. It thus provides a useful and important opportunity for this Court to clarify the doctrine.

To begin, placing the burden on the plaintiff to identify and disprove the existence of a procompetitive justification conflicts with this Court's decision in *Actavis*. There, while discussing the Rule of Reason and "offsetting or redeeming virtues," this Court made clear that "[a]n antitrust *defendant* may show in the

antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason." 133 S. Ct. at 2236 (emphasis added). Requiring that the plaintiff show a "net" anticompetitive effect in the market "as a whole" at the very first step just swallows this approach.

As Justice Breyer similarly explained in *California Dental Association*, "[i]n the usual Sherman Act §1 case, the defendant bears the burden of establishing a procompetitive justification." 526 U.S. at 788 (Breyer, J. concurring in part). As that opinion goes on to explain, the defendant "'alone would have the incentive to introduce such evidence' of procompetitive justification," which "is one of the reasons defendants normally bear the burden of persuasion about redeeming virtues." *Id.*

The leading antitrust treatise adopts the same view and, quite strikingly, explains that it should have been applied *in this very case*. *See* Areeda & Hovenkamp, 2017 Supp., ¶1505, p.171 (stating that proof of a harmful impact on merchant competition established *prima facie* case and "[t]hat burden having been met, the burden should shift to [Amex] to show a justification. ... The defendant, being the author of the restraints, is in a better position to explain why they are profitable and in the consumers' best interests").

Accordingly, placing the burden on plaintiffs to disprove offsetting procompetitive effects before they can make out even a *prima facie* showing of an adverse effect on competition—as the Second Circuit did—fundamentally warps established Rule-of-Reason analysis. The plaintiff should not have to speculate as to what evidence of procompetitive effects a defendant

might offer and then refute that hypothetical evidence to meet its initial burden. Under the Rule of Reason, the burden of coming forward with evidence of offsetting procompetitive effects must be placed on the defendant. It is the defendant who has the incentive to develop and present such evidence and it is the defendant who knows what allegedly procompetitive motivation and expected effects caused it to engage in the challenged conduct. If the plaintiff must initially prove that anticompetitive effects are not outweighed by procompetitive effects, then the burden of presenting evidence of procompetitive effects never shifts to the defendant at all. That result cannot be reconciled with decisions of this Court, sound antitrust policy, or hundreds of cases that have applied the Rule of Reason. *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. Rev. 1265, 1268 (empirical analysis of every Rule-of-Reason case in 22-year period found that "[i]f the plaintiff can demonstrate an anticompetitive effect, the burden shifts to the defendant to demonstrate a legitimate procompetitive justification for the restraint").

In short, the Second Circuit's approach threatens to swallow the typical burden-shifting approach to the Rule of Reason, and to sow deep confusion about the scope of the plaintiff's initial burden. That is particularly so because an adverse effect on horizontal price competition and the price setting mechanism—of the kind shown here—lies at the core of what should suffice for a *prima facie* case. Requiring a plaintiff to go beyond that showing and try to net out offsetting benefits among *other* consumers in its *initial* case has no basis in existing law and will deeply confuse courts seeking to apply the doctrine going forward.

II. Two-sided Platforms Do Not Require Special Rules For Defining Relevant Markets Or "Netting" Competitive Effects.

Prior to the Second Circuit's decision in this case, there was no decision defining a "relevant market" for antitrust purposes to encompass both sides of a two-sided platform, or requiring the netting of competitive effects across both "sides" of that platform. Certainly, *amici* are unaware of any such case, and the Second Circuit cited none. This Court should not allow this doctrinal novelty to persist and grow, because it is far out of step with basic principles of antitrust law.

First, under basic antitrust principles, a relevant product market includes only products or services "that have reasonable interchangeability" of use and exhibit "cross-elasticity of demand between the product itself and substitutes for it." *See United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 394 (1956); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). The products that Amex sells on the two "sides" of its platform do not exhibit those characteristics in any respect. Merchant services are not substitutes for the card-issuing services that Amex sells to cardholders. Merchants do not buy and have no use for the services sold to cardholders and cardholders do not buy and have no use for the services sold to merchants. There is also no cross-elasticity of demand between the two: A merchant could not switch to purchasing cardholder services in response to an increase in the price of merchant services, and a cardholder could not switch to network services in response to an increase in the price of cardholder services. Far from being substitutes, the two services act more as complementary products and so do not

belong in the same relevant market. Accordingly, the leading treatise concludes, without reservation, that the Court of Appeals clearly misidentified the relevant market below. *See* Areeda & Hovenkamp, 2017 Supp., ¶565, p.104 (Second Circuit "incorrectly conclud[ed] that the relevant market in which to consider American Express's anti-steering rules was not limited to the market for network [merchant] services but also included consumers. ... [T]hose two groupings are not substitutes for one another but rather behave more as complements.").

As the treatise further explains, separate product markets do not become a single relevant market for antitrust purposes simply because one defendant sells both products as parts of the same platform. The Second Circuit "was apparently misled by the fact that Amex obtained revenue from two sources, merchant fees and consumers, but the fact that a firm obtains its profits from two different, non-substitutable groups does not serve to place the two groups into the same relevant market; for example, a magazine might obtain revenue from readers and advertisers, but that does not entail a single 'reader/advertiser' market." Areeda & Hovenkamp, 2017 Supp., ¶565, p.104.

Antitrust scholars have likewise criticized the Second Circuit's holding that a procompetitive effect on cardholder services could be used to offset an adverse effect on competition in the sale of services to merchants, explaining that it is contrary to this Court's settled approach. For example, this Court addressed the question of whether a procompetitive effect in one area of competition could be used to offset an injury to competition in another area in *NCAA*, 468 U.S. at 85. There, this Court held that the defendant

could not justify a restraint on the market for TV broadcasting of college football games by arguing that its conduct had a beneficial effect on the market for live attendance at the game. *Id.* at 115-16; *see* Areeda & Hovenkamp, 2017 Supp., ¶562 at p.102 ("As in *American Express*, revenue came from two different sources ... ticket-paying live attendance ... and advertising-financed televising of those games. The Court held that, under the rule of reason, the NCAA could not justify the television restraint by arguing that it served to encourage more people to attend games rather than watch them on television"). As this Court explained in *United States v. Topco Association, Inc.*, 405 U.S. 596, 609-10 (1972), competition cannot be foreclosed in area to promote greater competition in another because courts have an "inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector."

Notably, this Court expressly confronted a two-sided platform in *Times-Picayune*—which concerned the sale of advertising space by a newspaper—and adopted no special approach of the kind the Second Circuit used. A newspaper is a classic two-sided platform: The paper sells ad space to advertisers on one side of the platform and news reporting to readers on the other side. This Court did not, however, hold that both sides of the two-sided platform had to be placed in the same relevant market or that the anticompetitive effect had to be measured across both sides. To the contrary, this Court held that "every newspaper is a dual trader in *separate* though interdependent markets." *Id.* at 610 (emphasis added). This Court further held that, because the

restraint in question was applied only in one of the two markets, the decisive question was whether the defendant had economic dominance in that market alone. *Id.* In other words, this Court held, in a case where the defendant operated a two-sided platform, that each of the products it sold was in a "separate ... market" and that if the defendant injured competition in the market where the restraint was applied, that violated the Sherman Act. The Second Circuit, however, did not even grapple with *Times-Picayune* in embarking on its novel approach. The resulting analysis is thus incorrect and draws into question fundamental antitrust principles. *See* Areeda & Hovenkamp, 2017 Supp., ¶1505, pp.170-71 (describing as "troubling" the Second Circuit's "conclusion that when a restraint is alleged in a two-sided market, a *prima facie* case requires the plaintiff to allege net harm aggregated across both sides").

What is most troubling, however, is the Second Circuit's holding that Amex should be allowed to use its NDPs to obstruct price competition and keep merchant prices high because "a reduction in revenue that Amex earns from merchants' fees may decrease the optimal level of cardholder benefits." Pet. App. 49a-50a. This evidences a profound misunderstanding of the antitrust laws. Basic antitrust policy requires that "*competition* should choose the optimal mix of revenue between the two sides"—not Amex's obstruction of price competition for the sale of services to merchants. Areeda & Hovenkamp, 2017 Supp., ¶562(e), p.101 (emphasis original). Amex is free to choose the price it wants to charge merchants and the value of the rewards it wants to give cardholders. It should not, however, be free to prevent merchants

from fostering price competition among Amex and its competing card networks and thus benefitting from the lower prices other competing networks might offer if merchants could steer consumers to lower-cost cards. Nor should Amex be free to choose for consumers whether they prefer Amex rewards over the discounts or other inducements merchants might offer them for using the merchants' favored cards. *See* Areeda & Hovenkamp, 2017 Supp., ¶1505, pp.170-71 ("[*C*]*ompetition* is what determines how revenue is assessed with respect to each side. Some card issuers pursue a strategy of obtaining high market fees while offering more generous terms to customers, while others do the opposite. [Amex's] policy effectively made customers indifferent to merchant charges and to the extent those charges could be expected to be higher, restrained competition[.]"). Contrary to the Second Circuit's view, Amex does not have "a legitimate interest" in restricting free market forces. Competition and the interaction of free market forces—not Amex's NDPs—must be allowed to determine the optimal level of both merchant prices and cardholder rewards.

III. The Decision Below Requires This Court's Immediate Review.

Unfortunately, the distorted approach to two-sided platforms and the Rule-of-Reason analysis adopted below is not just an ordinary error of law. *Amex* is a doctrinally important decision from an influential court in this field, and is likely to be followed by others. That influence will not be positive; the case is likely to spread doctrinal confusion that this Court will struggle to correct in any future case.

The core problem is that the Second Circuit's decision calls for evidence and analysis that is not tied to any intelligible antitrust principle, but plaintiffs will nonetheless have to try to engage and produce. Courts confronting arguments about "two-sided markets" in future cases cannot apply the ordinary rule requiring that products be reasonable substitutes when defining relevant markets, but will have to try anyway. Plaintiffs and defendants will thus embark on expensive expert discovery and district courts will render decisions about market definition that make no sense in the context of current doctrine, and then future courts will try to reconcile irreconcilable approaches, and imbed nonsensical rules into the law.

The decision below also threatens to unleash a deeply problematic approach to antitrust with its "netting" principle. As explained above, the proper balance of benefits and harms in the market *comes from competition*, not from judicial balancing. Entertaining voluminous and expensive expert discovery into the "net" effect of challenged restraints on different consumers in different relevant product markets is a pointless errand: It does not answer a question antitrust law should ask. Worse, it threatens to confuse lower courts regarding their mission. The goal is not to ensure that *somebody* benefits from competition; rather, it is to ensure that the challenged restraint is not disrupting competition in *its* market, causing a misallocation of resources to or from other areas in which free-market forces operate with less restraint.

The Court should also be concerned that these effects will be difficult to root out, particularly because of how plaintiffs' *prima facie* obligations have been

reimagined. Complex antitrust cases will settle under the pressure of this rule or will not be brought at all, because plaintiffs (and defendants) will bear a huge discovery expense in the face of deep uncertainty about how newly minted arguments about "net" effects and "multi-sided markets" will be applied in their cases. These effects will evade this Court's review, as will a burgeoning set of special rules for "two-sided markets" rendered in cases where the issue is either not dispositive or otherwise unsuited to this Court's review.

The problem is also particularly concerning because two-sided platforms are increasingly common. Such firms are not new: Newspapers (readers and advertisers), sports leagues (teams and fans), and cable TV (content providers and subscribers) are all two-sided platforms. That said, modern technologies have led to rapid growth in the number, size and importance of such firms: For example, Microsoft, Apple, Google, Facebook, Uber, and Amazon are all two-sided platforms. And because two-sided platforms are characterized by network effects (the platform becomes more valuable on *all* sides as more users adopt it), there is an entry barrier that tends to increase the possibility of market dominance and anticompetitive behavior in these markets. A special rule that largely exempts such firms from effective antitrust scrutiny is thus particularly dangerous, and even if it is eventually discarded, it may well entrench firms' dominance and create long-term harm to markets in the interim.

Looking forward, the doctrinal novelties in the decision below will form the basis of a new defense in every case directed at the anticompetitive conduct of a

firm that (even arguably) operates a two-sided platform. Answering that defense will not even involve asking the right questions, let alone reaching the right answers. The effects will be acutely felt in the health of both affected markets and the doctrine itself, and so *amici* strongly urge the Court to take up the Question Presented here without delay.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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ADDENDUM

ADDENDUM
Identity of *Amici Curiae*

The *amici* listed below are distinguished antitrust law professors and scholars. University affiliations are listed only for purposes of identification. Listed professors are acting only in their individual capacities and do not purport to represent the views of their universities.

- **Herbert Hovenkamp**, James G. Dinan Professor at the Law School and the Wharton School of the University of Pennsylvania. He has been the Rockefeller Foundation Fellow, Harvard Law School; Fellow of the American Council of Learned Societies, Harvard Law School; Faculty Scholar, University of Iowa; Presidential Lecturer, University of Iowa; and the recipient of the University of Iowa Collegiate Teaching Award. He is the senior surviving author of *Antitrust Law* (formerly with Phillip Areeda & Donald Turner), currently 22 volumes.

- **Harry First**, Charles L. Denison Professor of Law at New York University School of Law and Co-Director of the law school's Competition, Innovation, and Information Law Program. From 1999-2001 he served as Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York. Professor First is the co-author of the casebook *Free Enterprise and Economic Organization: Antitrust* (7th Ed. 2014). He was twice a

Fulbright Research Fellow in Japan and taught antitrust as an adjunct professor at the University of Tokyo. Professor First is a contributing editor of the *Antitrust Law* Journal, foreign antitrust editor of the *Antitrust Bulletin*, a member of the executive committee of the Antitrust Section of the New York State Bar Association, and a member of the advisory board and a Senior Fellow of the American Antitrust Institute.

- **Einer R. Elhauge**, Petrie Professor of Law at Harvard Law School, where he writes and teaches on Antitrust Law and Economics. Professor Elhauge is author of *U.S. Antitrust Law & Economics*, co-author of *Global Antitrust Law & Economic*, co-author of *Antitrust Law, Vol X* with Areeda, Elhauge & Hovenkamp, editor of the *Research Handbook on the Economics of Antitrust Law*, and the author of articles on antitrust law and economics that have won awards and appeared in peer-reviewed economics journals and top law reviews. He is also President of Legal Economics, LLC, former FTC Special Employee on Antitrust Issus, member of the editorial board for the Competition Policy International, and member of the advisory boards for the Journal of Competition Law & Economics and for the Social Sciences Research Network on Antitrust Law & Policy.

- **Eleanor M. Fox**, Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. She was awarded an inaugural Lifetime Achievement Award in 2011 by the *Global Competition Review* for "substantial, lasting, and transformational impact on competition policy and practice." She received the inaugural award for outstanding contributions to the competition law community in 2015 by the Academic Society for Competition Law, the world network of academic law and economic competition experts.

- **Stephen Calkins**, Professor of Law, Wayne State University. Professor Calkins is the author of one of the seminal Antitrust text books – *Antitrust Law: Policy and Practice* (4th ed. 2008) (with C. Paul Rogers III, Mark R. Patterson and William R. Andersen). He is also the author of *Antitrust Law and Economics in a Nutshell* (5th ed. 2004) (with Ernest Gellhorn and William Kovacic) and served as a co-editor of the *ABA Antitrust Section, Consumer Protection Law Developments* (2009). Professor Calkins is a life member of the American Law Institute, a fellow of the American Bar Foundation and a member of the advisory boards for the American Antitrust Institute, Sedona Conference and National State Attorneys General Program Advisory Project at Columbia Law School. For the American Bar Association, he has served on the Councils

of the Sections of Administrative Law and Regulatory Practice and the Section of Antitrust Law (two, three- year terms). He is a former chair of the Association of American Law School's Antitrust and Economic Regulation Committee.

- **Andrew I. Gavil**, Professor of Law, Howard University. Professor Gavil has co-authored several books, including *Microsoft and the Globalization of Antitrust Law: Competition Policy for the Twenty-First Century* with Professor First(2014), and *Antitrust Law in Perspective: Cases Concepts and Problems in Competition Policy* (3d ed. 2017) with Professors William E. Kovacic, Jonathan B. Baker, and Joshua D. Wright. Professor Gavil served as the Director of the Office of Policy Planning at the U.S. Federal Trade Commission. He currently serves as the Chair of the Editorial Board of the American Bar Association's Section of Antitrust Law's *Antitrust Law Journal* and he also serves as Chair of the Section's International Scholar in Residence Selection Committee.

- **Barak Richman**, Edgar P. and Elizabeth C. Bartlett Professor of Law and Professor of Business Administration at Duke University. He previously served as a law clerk to Judge Bruce M. Selya of the United States Court of Appeals for the First Circuit, and from 1994-1996 he handled international trade legislation

as a staff member of the United States Senate Committee on Finance. He writes regularly on issues related to economics and antitrust. Professor Richman is the author of *Stateless Commerce*, which was published by Harvard University Press.

- **Andrew Chin**, Professor of Law, University of North Carolina School of Law. Professor Chin is the recipient of a Rhodes Scholarship and a National Foundation Graduate Fellowship. He clerked for Judge Henry H. Kennedy Jr. of the United States District Court for the District of Columbia and assisted Judge Thomas Penfield Jackson and his law clerks in the drafting of the findings of fact in *United States v. Microsoft Corporation*.

- **Peter Carstensen**, Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School. He previously served as an attorney in the Antitrust Division of the United States Department of Justice. Professor Carstensen is also a Senior Fellow of the American Antitrust Institute.

- **Spencer Weber Waller**, Interim Associate Dean for Academic Affairs, Professor and Director for Consumer Antitrust Studies at Loyola University of Chicago, School of Law.

- **Darren Bush**, Professor of Law and Law Foundation Professor, University of Houston

Law Center. Professor Bush served as a co-author with Harry First and the late John J. Flynn on the antitrust casebook FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST (7th Ed.) with Foundation Press.

- **Robert H. Lande**, Venable Professor of Law, University of Baltimore School of Law. Professor Lande is a co-founder and a Director of the American Antitrust Institute, a past chair of the AALS Antitrust Section, and has held many positions in the ABA Antitrust Section. He is also an elected member of the American Law Institute.

- **Robin Feldman**, Harry & Lillian Hastings Professor of Law & Director of the Institute for Innovation Law, U.C. Hastings College of Law. Professor Feldman previously chaired the Executive Committee of the Antitrust Section of the American Association of Law Schools and clerked for The Honorable Joseph Sneed of the U.S. Court of Appeals for the Ninth Circuit. She is also a Fellow of the American Antitrust Institute.

- **Gregory T. Gundlach**, Coggin Distinguished Professor of Marketing in the Coggin College of Business at the University of North Florida. He is also a Director and Senior Fellow at the American Antitrust Institute. Before coming to the University of North Florida in 2003,

Professor Gundlach was the John Berry, Sr. Professor of Business at the University of Notre Dame.

- **John B. Kirkwood**, Professor of Law, Seattle University School of Law. He is a Senior Fellow of the American Antitrust Institute and an Adviser to the Institute of Consumer Antitrust Studies. Professor Kirkwood previously directed the Planning Office, the Evaluation Office, and the Premerger Notification Program at the FTC's Bureau of Competition in Washington, D.C. and later managed cases and investigations at the Northwest Regional Office.

- **Joshua P. Davis**, Associate Dean for Academic Affairs, Director of the Center for Law and Ethics, Professor, and Dean's Circle Scholar, University of San Francisco, School of Law. Dean Davis is on the board for the American Antitrust Institute, and he previously served as a Fellow at the Center for Applied Legal Studies at Georgetown University Law Center and as the clerk to the Hon. Patrick E. Higginbotham on the Fifth Circuit Court of Appeals.

- **Norman W. Hawker**, Professor of Finance and Commercial Law, Western Michigan University. He is also a Senior Fellow of the American Antitrust Institute.

- **Chris Sagers,** James A. Thomas Distinguished Professor of Law. He is a member of the American Law Institute, a Senior Fellow of the American Antitrust Institute, and a leadership member of the ABA Antitrust Section.

- **Thomas J. Horton**, Professor of Law and Heidepriem Trial Advocacy Fellow at the University of South Dakota School of Law.

- **Warren Grimes**, Associate Dean for Research and Irving D. and Florence Rosenberg Professor of Law, Southwestern Law School. Dean Grimes is co-author of the definitive antitrust law text for lawyers and law students, *The Law of Antitrust: An Integrated Handbook* with the late Professor Lawrence Sullivan. Dean Grimes has chaired the Los Angeles County Bar Association Antitrust and Trade Regulation Section and is a member of the Executive Committee, and he serves on the Advisory Board of the American Antitrust Institute.

- **Mark R. Patterson**, Professor of Law, Fordham University School of Law. Professor Patterson has also been a visiting professor at several law schools in the U.S. and at Bocconi University in Milan. He was a co-author of *Antitrust Law: Policy and Practice* (4th ed. 2008) (with C. Paul Rogers III, Stephen Calkins, and William R. Andersen) and is the

author of the forthcoming book *Antitrust Law in the New Economy: Google, Yelp, LIBOR, and the Control of Information* (Harvard 2017).

- **Marina Lao**, Professor of Law, Seton Hall Law. Professor Lao was previously awarded a Fulbright Fellowship. She currently serves as a member of the advisory board of the American Antitrust Institute, and was Chair of the Section of Antitrust and Economic Regulation of the Association of American Law Schools.

- **Michael A. Carrier**, Professor of Law, Rutgers Law School. Professor Carrier is a co-author of the leading IP/antitrust treatise, *IP and Antitrust Law: An Analysis of Antitrust Principles Applied to Intellectual Property Law* (2d ed. 2009, and annual supplements, with Hovenkamp, Janis, Lemley, and Leslie). He is a member of the Board of Advisors of the American Antitrust Institute and is a past chair of the Executive Committee of the Antitrust and Economic Regulation section of the Association of American Law Schools.

- **Edward Cavanagh**, Professor of Law, St. John's University. Professor Cavanagh is currently a member of the Council of the ABA Antitrust Section. He has previously served as co-chair of the ABA Antitrust Section Public Service Committee. He has also served as co-chair of the Antitrust Section's Civil Practice

and Procedure Committee. Professor Cavanagh is a past chair of the New York State Bar Association Antitrust Section and currently a member of its Executive Committee. Professor Cavanagh is a member of the Association of the Bar of the City of New York and has served on its Antitrust and Trade Regulation Committee and its Federal Courts Committee.

- **Barak Orbach**, Professor of Law and Director of the Business Law program, University of Arizona, James E. Rogers College of Law. Professor Orbach is the author of a leading casebook: *Regulation: Why and How the State Regulates* (Foundation Press, 2012). Professor Orbach previously served as an Advisor for Law & Economics to the Israeli Antitrust Commissioner.